SHANMUGANATHAN VENUGOPAL v. AZIZIE DIN

HIGH COURT MALAYA, IPOH
SM KOMATHY SUPPIAH JC
[CIVIL APPEAL NO: 11BNCVC-53-12-2014]
8 MAY 2015

MONEYLENDERS: *Moneylending transaction – Monies due and owing – Claim for – Moneylending agreement – Whether plaintiff a licensed moneylender – Whether requirement under s. 8 Moneylenders Act 1951 complied with – Whether moneylending agreement valid and enforceable – Contracts Act 1950, s. 24*

CONTRACT: *Void contract – Effect – Moneylending agreement rendered void and unenforceable – Plaintiff failed to seek claim for restitution – Whether plaintiff bound by pleadings – Whether plaintiff aware of illegality of agreement at time it was signed – Whether order for restitution under s. 66 Contracts Act 1950 should be invoked*

The plaintiff and the defendant had entered into a moneylending agreement ('moneylending agreement'). The agreement stated, *inter alia*, that the defendant had taken a loan of RM25,000. Subsequently, the plaintiff sent a legal notice to the defendant informing him that that if the outstanding instalments was not paid, the moneylending agreement would be deemed terminated upon the expiry of the time given. The defendant failed to do so and the plaintiff commenced this action in the Magistrate's Court. At the conclusion of the trial, the Magistrate found that the plaintiff was a licensed moneylender and entitled to sue on the agreement, but dismissed the claim on the ground that the strict requirement in s. 16 of the Moneylenders Act 1951 ('Moneylenders Act') was not fulfilled. The plaintiff thus appealed to this court. The issues that arose were, *inter alia* (i) whether the plaintiff was a licensed moneylender; (ii) whether the moneylending agreement between the plaintiff and the defendant was valid; and (iii) whether the plaintiff could seek restitution under s. 66 of the Contracts Act 1950 ('Contracts Act').

Held (dismissing appeal with costs):

(1) The moneylending license produced by the plaintiff was in the name of a firm known as Vshan Enterprise. The moneylending license was not in the plaintiff's name and neither was any evidence led by him to show that he was the proprietor of Vshan. The plaintiff had failed to discharge the onus on him to prove that he was a licensed moneylender. (paras 9 & 11)

(2) By operation of s. 8(b) and (c) of the Moneylenders Act, a moneylender who carries on business or enters into any moneylending agreement otherwise than in his authorised name commits an offence and the agreement is illegal and void and therefore unenforceable. In entering into the moneylending agreement in his own name instead of in the name

of the firm, the plaintiff had contravened the mandatory statutory requirement under s. 8 of the Moneylenders Act. This rendered the moneylending agreement to be void under s. 24 of the Contracts Act and not enforceable by law. (paras 15 & 18)

(3) The Magistrate had refused restitution under s. 66 of the Contracts Act as the plaintiff had not sought the relief in his claim. It is an elementary rule that parties are bound by their pleadings. Had the matter been pleaded or particularised, the defendant might well have produced evidence to rebut the claim for restitution. The claim should not now be permitted to be raised. In a case where a defendant sets up a plea that the contract is void, it is incumbent on a plaintiff to amend his claim to include relief under the section. To invoke s. 66, the applicant must show that he was unaware of the illegality at the time of the transaction in question. There was no evidence that the plaintiff was unaware of the illegality of the moneylending agreement at the time it was signed. Indeed, it was not open to a licensed moneylender to plead so because it was his business to know the provisions of the law pertaining to his trade. (paras 30 & 31)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Browne v. Dunn [1893] 6 R 67 ***(refd)***

Chase Perdana Bhd v. Md Afendi Hamdan [2009] 6 CLJ 501 FC ***(refd)***

Lum Sow Kuen v. Chuah Choong Hong & Ors [1998] 4 CLJ Supp 161 HC ***(refd)***

Menaka v. Lum Kum Chum [1976] 1 LNS 181 PC ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Soh Eng Keng v. Lim Chin Wah [1979] 1 LNS 98 HC ***(refd)***

Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Yee Hoong Loong Corpn Sdn Bhd v. Kwong Fook Seng Co [1993] 1 CLJ 90 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24, 66

Moneylenders Act 1951, ss. 8(b), (c), 16

For the appellant - Murali Puranachandran; M/s AL Murali & Co
For the respondent - Aiza Ali Raman; Legal Aid Department, Perak

Reported by Suhainah Wahiduddin

JUDGMENT

SM Komathy Suppiah JC:

[1] This is an appeal against the decision of the learned Magistrate who on 14 November 2014 dismissed the plaintiff's claim on the ground that it was void and unenforceable for breach of the Moneylenders Act 1951 ("Moneylenders Act").

[2] A principal issue raised in this appeal is whether the Magistrate upon finding that the transaction was void, ought to have made an order for restitution under s. 66 of the Contracts Act 1950 ("Contracts Act").

Brief Facts

[3] I shall restrict the recital of facts to the barest minimum necessary to identify the points at issue. The defendant applied for a loan from the plaintiff. The plaintiff and the defendant then entered into a moneylending agreement ("moneylending agreement") dated 6 November 2013. The form of the agreement was in accordance with Schedule J of the Moneylenders (Control and Licensing) Regulations 2003 under the Moneylenders Act 1951 ("Moneylenders Act"). The signatures of both plaintiff and the defendant in the agreement was attested by one Nasaruddin bin Ahmad, a Commissioner for Oaths.

[4] The agreement stated, *inter alia*, that the defendant had taken a loan of RM25,000 and that interest at 18% was payable on the loan and the same was to repaid by 60 monthly instalments of RM607. It further stated that if the defendant failed to repay any sum that has become due for more than 28 days, the plaintiff was entitled to terminate the moneylending agreement and seek repayment.

[5] On 27 February 2014 , the plaintiff through his solicitors sent a legal notice to the defendant informing him that no instalments had been paid under the moneylending agreement and that if the three outstanding instalments of RM1,821 was not paid within 14 days, the moneylending agreement would be deemed terminated upon the expiry of the time given. The defendant failed to do so and the plaintiff commenced this action in the Ipoh Magistrates' Court in December 2014. It was pleaded in the statement of claim that the plaintiff was a licensed moneylender and was therefore entitled to recover the principal sum and interest in accordance with the moneylending agreement.

[6] In his defence, the defendant specifically denied knowledge of the fact that the plaintiff was a licensed moneylender and disputed the validity of the moneylending agreement. He denied he was given a loan of RM25,000 and alleged that he had only taken a sum of RM1,500 from the plaintiff in June 2011 and after the same was repaid, he took a further RM1,500 in early 2012. He signed a blank sheet at the request of the plaintiff at this time. He further alleged that he was not given a stamped copy of the moneylending agreement as mandated by s. 16 of the Moneylenders Act.

[7] Both the plaintiff and the defendant gave evidence at the trial in support of their respective cases. The plaintiff called the Commissioner for Oaths who attested the signatures on the moneylending agreement as his witness, whilst the defendant did not call any. At the conclusion of the trial, the Magistrate found that the plaintiff was a licensed moneylender and

A entitled to sue on the agreement, but dismissed the claim on the ground that the strict requirement in s. 16 of the Moneylenders Act was not fulfilled. From that decision the plaintiff appealed to this court.

Issues On Appeal

B **[8]** There are essentially four issues in this appeal:

(i) Whether the plaintiff is a licensed moneylender;

(ii) If no, whether the moneylending agreement between the plaintiff and defendant is valid;

C (iii) If yes, whether there was compliance with s. 16 and a stamped copy of the said moneylending agreement was given to the defendant prior to the money being given to him and

(iv) If no, whether the plaintiff can seek restitution under s. 66 of the Contracts Act.

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First Issue: Whether Plaintiff Is A Licensed Moneylender

[9] The first issue is whether the plaintiff is a licensed moneylender. The moneylending license produced by the plaintiff was not in the name of the plaintiff but a firm known as Vshan Enterprise. On this issue, the Magistrate E held that it was not open to the defendant to deny that the plaintiff was a licensed moneylender as this was not part of his pleaded case.

[10] It is a fundamental principle of evidence that the burden of proof in the civil trial is on the plaintiff and if he fails to discharge the burden of proving what is pleaded in support of his case, the court is bound to dismiss F the claim. In the present instance, the plaintiff alleged in his claim that he was a licensed moneylender. The defendant responded to the averment by stating that he had no knowledge of this fact. In light of the defendant's averment, it was incumbent on the plaintiff to prove this fact on a balance of probabilities and I agree with the defendant that the Magistrate erred in G holding that the defendant's pleading did not permit him to dispute this fact.

[11] The moneylending license was not in the plaintiff's name and neither was any evidence led by him to show that he was the proprietor of VShan. In the circumstance, I agree with the defendant that the plaintiff had failed to discharge the onus on him to prove that he was a licensed moneylender. H The decision of the Magistrate on this issue is clearly wrong.

Second Issue: Whether The Moneylending Agreement Was Valid

[12] That brings me to the second issue and it concerns the validity of the moneylending agreement entered into between the plaintiff and the I defendant. As noted earlier, the license was issued to VShan. There was a printed condition on the license which stated that "any transaction of money-lending shall be made on the name of moneylender and the address registered

on the license." The defendant unsuccessfully mounted a submission before the magistrate that as the moneylending agreement was not between VShan and the defendant, it was void . It was rejected on the ground that the validity of the agreement was not challenged in the defence.

[13] I agree with the defendant that this was a misdirection by the learned Magistrate. It is trite law that questions of law need not be raised in the pleadings and it is for counsel to raise the questions of law and make the legal submissions to the court. In any event, the issue of the validity of the moneylending agreement was raised in the defendant's written submission and was also argued by counsels for both parties in the trial court below. Therefore the issue was squarely and rightly before the court and the court was under a duty to deal with the issue.

[14] Section 8 of the Moneylenders Act provides:

> If a licensee:
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> (a) takes out a licence in any name other than his true name;
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> (b) being licensed as a moneylender, carries on business as such in any name other than his authorized name or at any other place than his authorized address or addresses;
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> (c) in the course of business as a moneylender enters into any moneylending agreement with respect to any advance or repayment of money or takes any security for money otherwise than in his authorized name; or
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> (d) lends money to a person under the age of eighteen years,
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> he shall be guilty of an offence under this Act and shall be liable to a fine not exceeding fifty thousand ringgit and for a second or subsequent offence shall be liable to the fine aforesaid or to imprisonment for a term not exceeding twelve months and an offender being a company, society, firm or other body of persons shall for a second or subsequent offence be liable to a fine not exceeding one hundred thousand ringgit.
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> No moneylending agreement shall be enforceable unless the agreement has been signed by all parties to the agreement and a copy of the agreement duly stamped is delivered to the borrower by the moneylender before the money is lent.

[15] By operation of s. 8(b) and (c) a moneylender who carries on business or enters into any moneylending agreement otherwise than in his authorised name commits an offence and the agreement is illegal and void and therefore unenforceable. The effect of non-compliance of s. 8(c) is exemplified by the decision of the Privy Council in *Menaka v. Lum Kum Chum* [1976] 1 LNS 181; [1977] 1 MLJ 91. There the appellant was a moneylender and was licensed to carry on the business of moneylending under the name of "AR.PR.M.Firm". He made a loan of $20,000 to the respondent and as security for the loan the respondent gave a charge over six pieces of land in

favour of the appellant. The memorandum of loan and memorandum of charge contained statements that the lender was the appellant as an individual. On the appellant's application for an order for sale of the land by public auction to satisfy the principal sum and interest, the respondent opposed the application on the ground that the loan was not in the registered name of the moneylender and contravened s. 8(b) and (c) of the Moneylenders Ordinance 1951.

[16] The High Court and on appeal the Federal Court dismissed the appellant's claim on the ground that the agreement was void as it was forbidden by s. 8(b) and (c). The appellant then obtained leave to appeal to the Privy Council. The Privy Council affirmed the decision of the Federal Court and High Court and stated:

> For these reasons their Lordships are of opinion that the appellant contravened paragraph (c) of section 8.
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> ...
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> What then are the results of such a contravention and in particular does it avoid the contract between the appellant and the respondent's late husband, and the charge that was granted to the former by the latter? Section 8 of the Moneylenders Ordinance provides in terms for criminal sanction by way of a fine or imprisonment on any person who is guilty of an offence under the section, but it is silent on the question whether the offending contract and charge are to be avoided. The general rule was stated in *Cope v. Rowlands* 1836 2 M & W 149 157 by Parke B. thus:
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> It is perfectly settled, that where the contract which the plaintiff seeks to enforce … is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies prohibition.
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> ...
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> Their Lordships are therefore of opinion that the contract and the security, having been made in contravention of section 8, are unenforceable. As the contract is not enforceable by law, it is void under section 2(g) of the Contracts (Malay States) Ordinance, 1950. Neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith. The contract was "discovered" to be void only after these proceedings had been started.

[17] And, in similar vein, in *Chase Perdana Bhd v. Md Afendi Hamdan* [2009] 6 CLJ 501; [2009] 6 MLJ 783 Zaki Azmi Chief Justice stated:

> The law on this is quite established. Once it is enacted by legislation that parties are required to comply with any provision, parties must comply with such provision. It is not for any person to waive legislative requirements by an agreement unless the legislation allows it to be done.

[18] Based on the foregoing binding authorities, the conclusion of the Magistrate that the moneylending agreement was valid is plainly wrong. In entering into the moneylending agreement in his own name instead of in the name of the firm, the plaintiff had contravened the mandatory statutory requirement under s. 8 of the Moneylenders Act. This renders the moneylending agreement to be void under s. 24 of the Contracts Act and not enforceable by law.

Third Issue: Whether There Was Compliance With s. 16

[19] In view of my finding that the moneylending agreement is void for contravention of s. 8(c), the third issue does not call for decision. However, I shall set out briefly the conclusion I would have reached if it had been necessary to do so.

[20] The second issue is based on s. 16 of the Moneylenders Act. This section stipulates that a stamped copy of the moneylending agreement signed by the parties must be served on the defendant prior to the advance of the loan. The Magistrate dismissed the claim as she found that the plaintiff failed to prove on a balance of probabilities that he had complied with the requirement under s. 16.

[21] The plaintiff contended that the above finding was wrong as there was no judicial appreciation by the Magistrate of the evidence on this issue in two important aspects. First, the plaintiff testified without challenge that he personally served a copy of the agreement to the defendant. Secondly, and most crucially the defendant in his evidence did not assert that the moneylending agreement was not served on him. The Magistrate, it was argued, ought to have taken this failure into account in assessing the evidence on this critical issue, but nowhere in her judgment was there any indication that she did so.

[22] It is a long established principle that under the rule in *Browne v. Dunn* [1893] 6 R 67, it is imperative that a witness whose credibility is to be impeached must be challenged in cross-examination. Failure to do so will be treated as an acceptance of that part of his evidence. See *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1996] 3 AMR 3506, *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 3 AMR 41, *Lum Sow Kuen v. Chuah Choong Hong & Ors* [1998] 4 CLJ Supp 161, and *Wong Swee Chin v. Public Prosecuto*r [1980] 1 LNS 138; [1981] 1 MLJ 212 at p. 213.

[23] This case falls squarely within the rule in *Browne v. Dunn*. Here too the plaintiff's evidence that he had served a copy of the moneylending agreement was not subjected to any cross-examination and indeed the position is stronger here, for the defendant did not deny the same in his evidence. The Magistrate had adopted the wrong approach in the evaluation of the evidence and her conclusion cannot be supported.

A **Fourth Issue : Section 66 Of The Contracts Act**

[24] I now turn to the fourth and last issue premised on s. 66 of the Contracts Act. Section 66 provides:

> When an agreement is discovered to be void, or when a contract becomes
B void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[25] The plaintiff contended that the Magistrate was wrong in refusing to grant relief under s. 66 when she held that the moneylending agreement was
C void and not enforceable for contravention of s. 16. It was common ground that the magistrate declined to do so on the basis that it was not part of the plaintiff's pleaded case and was only raised during submissions. It is apposite to mention here that the Magistrate did not deal with the plaintiff's claim for relief under s. 66 in her grounds of judgment though it was raised and argued in submission.

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[26] The scope of s. 66 has received judicial consideration in numerous cases. It has been held that the principle of restitution embodied in s. 66 does not apply to all void contracts but only to a contract that is discovered to be void *ab initio* or when it becomes void. To invoke this relief the invalidity
E of the contract should be discovered subsequent to the making of it and the illegality must be unbeknown to the person invoking it. Section 66 does not make a new contract between the parties but only provides for the restitution of the advantage taken by a party under the contract. It does not work in one favour of only one party but requires both parties to restore their respective benefits derived under the void contract.

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[27] Section 66 of the Contracts Act has been applied in moneylending cases where the moneylending agreements were found to be void and unenforceable due to contravention of the Moneylenders Ordinance by requiring the borrower to return the money borrowed. In *Menaka v. Lum*
G *Kum Chum* (*supra* at para [13]) the court allowed relief under s. 66 since the appellant was not aware of the illegality of the transaction at the time they executed the agreement.

[28] In *Yee Hoong Loong Corpn Sdn Bhd v. Kwong Fook Seng Co* [1993] 1 CLJ 90 at p. 92; [1993] 1 MLJ 163, Peh Swee Chin J observed at 167:

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> Under s 66 of the Contracts Act 1950, a court can lawfully order reasonable compensation for any benefit obtained and given under a contract by any party when the contract is found to be void for any valid legal reason whatsoever, provided that both parties or the party seeking such reasonable compensation, did not know at the time of contract that
I it was not valid. Reasonable compensation would be the same in my opinion as quantum meruit, the latter expression being just a name of a remedy for reasonable compensation used in various contexts.

[29] In *Soh Eng Keng v. Lim Chin Wah* [1979] 1 LNS 98; [1979] 2 MLJ 91, Wan Yahya J observed:

> To my mind, this section has to be applied with care and is not open to indiscriminate use by unlicensed moneylenders whose claims have been defeated by reason of the contravention of the provisions of the Moneylenders Ordinance, 1951. Section 66 of the Contracts Act is not intended to override those provisions of the Moneylenders Act which make contracts in moneylending transactions void but is meant to provide some relief to a party whose right in an agreement has become unenforceable through no fault of his own making.
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> I am of the firm opinion that the words 'discovered' and 'becomes' appearing in section 66 above are not superfluous words used by the legislators. On the contrary, they are words inserted in that section for a specific reason and that is to qualify or restrict the type of agreement to which that section will apply. As I have said in the earlier case, the term 'discover' here clearly indicates something which the parties were unaware of at the time of making the agreement and which they gained sight of or detected subsequently and the word 'becomes' refers to something not present when the contract was signed but came into being at a later stage.

[30] Based on the foregoing, it is clear that the plaintiff would be entitled to restitution if it can satisfy the preconditions under s. 66. In the present case, the Magistrate as stated earlier, refused restitution as the plaintiff had not sought this relief in his claim. The question of whether a claim for restitution can be sought where this relief is not specifically pleaded in the alternative is not a matter which has received judicial consideration and I have not been referred to any authorities upon it. In the absence of any authority to support the position taken by the plaintiff that it need not be pleaded, I would reject it. It is an elementary rule that parties are bound by their pleadings. Had the matter been pleaded or particularised, the defendant might well have produced evidence to rebut the claim for restitution. In these circumstances, the claim should not now be permitted to be raised. In my judgment in a case where a defendant sets up a plea that the contract is void, it is incumbent on a plaintiff to amend his claim to include relief under the section.

[31] But even if I am wrong about that, there is another ground on which it can be said that the claim for restitution is bound to fail. This is based on the principle that to invoke s. 66, the applicant must show that he was unaware of the illegality at the time of the transaction in question. In the present case, there is no evidence that the plaintiff was unaware of the illegality of the moneylending agreement at the time it was signed. Indeed it is not open to a licensed moneylender to plead so because it is his business to know the provisions of the law pertaining to his trade.

Conclusion

[32] For the reasons stated, the appeal is dismissed with costs of RM2,000.